IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CHASE MANHATTAN MORTGAGE CORP., et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 01-507 (KAJ)
ADVANTA CORP., et al.,	)	
Defendants.	)	

MEMORANDUM ORDER

Yesterday I issued a memorandum order ruling on two of four outstanding *in limine* applications by the parties. In the present order I will provide my reasoning for denying Advanta's motion to exclude documents under 12 CFR §§ 4,36, 4.37, and I will give my decisions on the remaining two *in limine* issues.

Advanta's Motion Under 12 CFR §§ 4,36, 4.37 to Exclude Documents

I have denied this motion because my review of the regulations cited by Advanta, as well as of the documents in question, indicates that Advanta has attempted to stretch beyond recognition the regulatory protections in question. Advanta points to a portion of the OCC's regulations that states, "[a]ll non-public OCC information remains the property of the OCC. No supervised entity, government agency, person, or other party to whom the information is made available, or any officer, director, employee, or agent thereof, may disclose non-public OCC information without the prior written permission of the OCC ... ." 12 CFR § 4.36(d). On the basis of § 4.36, Advanta asserts that information that has already come into Chase's possession regarding an OCC review of the business sold in the transaction at issue in this case is subject to an evidentiary

privilege that prevents Chase's putting those documents in evidence. In a related vein, Advanta appeared to argue during the pretrial conference on March 25, 2004 that the regulations created a free-standing legal obligation of the court to prevent any disclosure of the allegedly privileged documents without the OCC's express and advance permission. (*See* Tr. 28:12 – 32:7.) Though Advanta was given the opportunity in the draft pretrial order and in two subsequent letters it has submitted to provide authority for its assertions about the meaning and effect of the regulations, it has provided none.

The regulations in question were apparently designed to protect the OCC's internal deliberations and to prevent the agency from being drawn into the discovery battles of private litigants. To the extent the regulatory provisions cited by Advanta create a special privilege for OCC documents, it is of the same character as the "long-recognized" deliberative process privilege belonging to the government. *See Redland Soccer Club v. Dept. of Army*, 55 F.3d 827, 853 (3d Cir. 1995) (a governmental deliberative process privilege "permits the government to withhold documents containing 'confidential deliberations of law or policy-making, reflecting opinions, recommendations or advice."). Leaving aside the question of whether Advanta has any standing whatsoever to assert the claimed privilege, Advanta has not in any manner discussed how the documents specifically at issue implicate the purposes of the regulations. The burden of showing the applicability of a privilege falls on the party trying to assert it, and Advanta has failed to carry that burden. The OCC has not been asked to provide anything. Chase has the documents. Nor has Advanta shown how the documents put at risk in any manner the public's interest in protecting the internal

deliberative processes of the OCC. On the contrary, on the single occasion when Advanta did discuss the specifics of one of the documents it seeks to exclude on the basis of the regulations, its attorney described an e-mail from Advanta's CFO to two Advanta in-house lawyers in which the CFO talks about a conversation with an OCC examiner. (*See* Tr. 29:13-17.) While a corporate officer's discussions with the same corporation's in-house counsel may raise attorney-client issues, which are addressed later herein, it is too much of a stretch to say that they constitute secret, internal OCC deliberative information which belongs to the OCC and cannot be revealed without the OCC's express permission.

Advanta's Motion to Exclude Documents Allegedly Subject to the Attorney-Client Privilege

This motion is also DENIED. Advanta has taken the position that documents that have long-since come into Chase's possession as a result of the transaction at issue remain privileged because the privilege was reserved by a provision within the transactional documents. (*See* Docket Item ["D.I."] 382 at 57.) Advanta admits that the documents in question "came into Chase's possession upon the closing of the asset purchase transaction[,]" but nevertheless claims that, under the terms of the transaction agreement[1], "Chase is, in effect, Advanta's custodian of these materials with no right to use them as evidence in this case." (*Id.* at 55-56.) Advanta has also described the circumstances as "tantamount to a warehouse or bailment agreement, where the

[1]While I refer to the transaction "agreement" in the singular, it is understood that the overall transaction was governed by a number of different documents captioned as agreements, including the "Information Access Agreement" (*see* D.I. 406 at Ex. 26) most particularly relevant here.

warehouseman or bailee is contractually obligated to maintain the confidential and privileged nature of the materials with which it has been entrusted." (D.I. 408 at 2.)

Chase has countered those assertions by quoting the language of the transaction agreement itself. In the section entitled "Legal Department Information," the agreement states that all information relating to the business that Chase was acquiring from Advanta was to be transferred to Chase, with Advanta retaining the non-related information possessed by the legal department. (*see* D.I. 406 at Ex. 26 at Bates pg. CMM 5254436.) The express retention of attorney-client privilege rights, to the extent effective, was reserved for the non-related information that might end up in Chase hands because of the transfer of employees to Chase as part of the transaction. (*See id.*) That result is, of course, what one would expect, since it would be strange indeed for reasonable business people to negotiate a transaction in which material information concerning the object of the purchase and sale was somehow retained as the property of the seller, with the buyer left as a warehouseman. Advanta has done nothing to demonstrate the documents at issue are, or any particular document is, unrelated to the business.[2] Advanta having failed to carry the burden of establishing that the documents are privileged, the *in limine* application is denied.

Chase's Motion to Exclude Evidence of the Post-Closing Value of the Residual Interests

Chase's motion is DENIED. Chase has asserted that the only measure of damages under its claims is determined by what it actually paid and what it would have paid, but for Advanta's alleged deceptions. However, Chase continues to press its

[2]If that were the case, of course, the document might be inadmissible on relevance grounds.

Delaware law claim for rescission or rescissory damages. (*See* D.I. 400.) As Chase admits, though, evidence of the performance of the residual assets after the transaction closed is relevant even under Chase's theory because rescissory damages may be measured as of the time of judgment. (*Id.* at 2.) *See In re MAXXAM Inc. Shareholders Litig.*, 659 A.2d 760, 776 (Del. Ch. 1995). For that reason alone, evidence of post-closing performance is relevant and admissible. Moreover, as Advanta points out, Chase is apparently attempting to put post-closing evaluation information into evidence for its own purposes. It's protestations of irrelevance are thus less than compelling. Rather than comment further at this stage on what the proper measure of damages should be, it is sufficient, in the context of this bench trial, to say that I am satisfied that Chase has not shown the evidence is utterly lacking in relevance, nor have they made the case that the evidence will be unduly prejudicial. Their *in limine* application is therefore denied.

Kent A. Jordan
UNITED STATES DISTRICT JUDGE

April 23, 2004
Wilmington, Delaware